Supreme Court, U.S.
FILED
JUN 2 0 2003
OFFICE OF THE CLERK

(5)

NO. 02-1633

IN THE

Supreme Court of the United States

MAHER W. SOLIMAN
Petitioner,
v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAHER W. SOLIMAN, JD
1112 LARKIN STREET, SUITE 405
SAN FRANCISCO, CALIFORNIA 94109
TELEPHONE: (415) 776-3998

FILED BY: MAHER W. SOLIMAN, JD
PETITIONER IN PROPRIA PERSONA

14 pp

TABLE OF CONTENTS

		Pages
INTRODUCTION		1
REASONS FOR GRANTING THE WRIT		3
I.	THE DISTINCTION BETWEEN CLAIMS THAT ARE PREDICATED ON A DUTY BASED ON SMOKING AND HEALTH AND CLAIMS THAT ARE PREDICATED ON THE DUTY NOT TO DECEIVE IS AN IMPORTANT QUESTION OF FEDERAL LAW	3
II.	THE COURT SHOULD CLARIFY THE DISTINCTION BETWEEN THE PROVINCE OF THE COURT AND THAT OF THE JURY PURSUANT TO THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION	4
CONCLUSION		6

TABLE OF AUTHORITIES

	Page
CASES	
Beacon Theatres v. Westover, 359 U.S. 500 (1959).....	5,6
Bennett v. Butterworth, 52 U.S. (11 How.) 669 (1850)..	5
Buzard v. Houston, 119 U.S. 347, 351 (1886).....	5
Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703, 120 L. Ed. 2d 407, 430.....	1,3,4,6
Dairy Queen v. Wood, 369 U.S. 469 (1962).....	6
Hipp v. Babin, 60 U.S. (19 How.) 271, 278 (1857).....	5
Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884).....	5
Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874).....	5
Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).....	6
Medtronic, Inc. v. Lohr (1996) 116 S. Ct. 2240.....	4
Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932)...	5
Scott v. Neely, 140 U.S. 106, 109 (1891).....	5
STATUTES	
California Business and Professions Code Section 17208.....	1

OTHER AUTHORITIES

Seventh Amendment of the United States Constitution..... 7

INTRODUCTION

Petitioner received Respondents' reply on June 17th, 2003. Respondents B.A.T. Industries PLC and Liggett Group did not file Opposition to Petitioner's Petition for Certiorari. Contrary to defendants' assertions, plaintiff has repeatedly argued before the District Court as well as the Ninth Circuit that his claims could be construed as asserting claims for "unfair competition" and he repeatedly argued that his claims are covered by California Business and Professions Code Section 17208 for four year statute of limitations. This argument was argued before the District Court as well as the Ninth Circuit. Most specifically in Plaintiff's Opposition to Defendants' Motions for Dismissal as well as Motions to Strike. Plaintiff's claims are not based on injury caused by product but caused by defendants' conduct and the complaint speaks for itself. Also, petitioner has repeatedly argued before the Ninth Circuit as well as the District Court that two of the defendants (Council for Tobacco Research and Tobacco Institute) are only trade associations. These two defendants do not produce, manufacture, design or market any product, therefore the Dismissal of Petitioner's claims by the Ninth Circuit as well as the District Court specifically against these two Defendants on the grounds of he Expiration of Statute of Limitations for injuries caused by defective product is erroneous and it does not stand up to logic nor is it supported by the facts or the law. Respondents are well aware that this ruling by the Ninth Circuit is erroneous and a miscarriage to justice. Furthermore, it is contradicted by this Court's prior decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Additionally and contrary to Respondents' assertions, all other issues in the petition were argued in the Ninth Circuit as well as the District Court. Respondents are not claiming (nor could they) that Petitioner is unable to prove Fraud and Conspiracy should this case get reversed and proceed to trial. The decision of the Ninth Circuit should not be allowed to stand. It incorrectly suggests that tobacco industry have the right to

avoid liability despite the fact that they engaged in the following conduct:

a. Defendants for many years that nicotine is addictive but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact, in order to conceal the addictive nature of cigarettes from the public, including plaintiff;

b. During the same time defendants have publicly denied the addictive nature of nicotine, defendants have intentionally controlled the level of nicotine and other toxic substances they have sold, in order to preserve the dependence of smokers on cigarettes that defendants sell. To this end, defendants have utilized additives such as ammonia, as well as designs for which defendants have sought patents, to make cigarettes, in effect, a "package" for the delivery of nicotine. Defendants have intentionally sought to "increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes," maintain "the proper amount of nicotine in tobacco smoke," and "deliver a pharmacologically active dose of nicotine to the smoker.";

c. During the same period of time, despite this voluntary and public undertaking to protect the public's "health as a basic responsibility paramount to every other consideration," Defendants have also intentionally avoided researching or developing cigarettes that would not cause dependence or addiction in those who use them;

d. In their efforts to conceal the health hazards of smoking and the addictive nature of nicotine, Defendants have testified falsely under oath before the United States Congress, provided false explanations to customers and governmental entities about the health hazards of tobacco and the harmful qualities of nicotine; concealed their secret research and testing on the dangers of cigarette smoking; [and] concealed their deliberate manipulation of the nicotine levels of cigarettes.

The Ninth Circuit incorrectly suggests that these defendants can only be liable for any defect in their product within timeline of one year Statute of Limitations and cannot be liable for their conduct as outlined above.

Respondents Brief in Opposition to the Petition for Writ of Certiorari demonstrates why the Petition should be granted, because it accurately identifies the crucial issues and illustrates the confusion surrounding the proper standard of review. Because of this confusion in the applicable standard, this Court should directly address the application of the Statute of Limitations to claims that were brought as a result to injuries caused by defendants' conduct and not their product.

REASONS FOR GRANTING THE WRIT

I. THE DISTINCTION BETWEEN CLAIMS THAT ARE PREDICATED ON A DUTY BASED ON SMOKING AND HEALTH AND CLAIMS THAT ARE PREDICATED ON THE DUTY NOT TO DECEIVE IS AN IMPORTANT QUESTION OF FEDERAL LAW

Petitioner asks this Court to articulate the standards that apply to distinguish claims that are not predicated on a duty based on smoking and health but rather on more general obligation.....the duty not to deceive. *Cipollone v. Liggett Group, Inc.* 60 U.S.L.W. 4703, 120 L. Ed. 2d 407, 430. Indeed, Justice Blackmun stated in a concurring opinion, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement the court's decision." *Cipollone v. Liggett Group, Inc.* 60 U.S.L.W. 4703, 120 L. Ed. 2d 407, 439. Apparently, the speculation of Justice Blackmun has been proven true in this case.

This Court should take the opportunity to provide guidance given the difficult nature of the subject and the hard-to-digest *Cipollone* opinion because *Cipollone* is the law in cigarette cases amplified and supported by this Court in *Medtronic, Inc. v. Lohr* (1996) 116 S. Ct. 2240. Furthermore, *Cipollone* holds defendants obligated for the post-1970 advocacy statements because they constitute an "undertaking." One who undertakes to communicate with the public has a duty to do it non-negligently. This principle applies even if the party had no duty to communicate in the first place. *Cipollone* stated that: "[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement....imposed under State law" within the meaning of §5(b). 120 L. Ed. 2d 407, 428.

Defendants' advocacy activities can also be seen as violations of the "duty not to deceive" under *Cipollone*: "Moreover, petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by §5(b). Such claims are not predicated on a duty based on smoking and health" but rather on a more general obligation - the duty not to deceive. 120 L. Ed. 2d 407, 430.

This Court has ruled on the related issues, but never directly on the issue presented in the present Petition for Certiorari with respect to Statute of Limitations in relation to the conduct of defendants. This case now gives the Court the opportunity to articulate clear standard that applies to claims that are predicated on the duty not to deceive.

II. THE COURT SHOULD CLARIFY THE DISTINCTION BETWEEN THE PROVINCE OF THE COURT AND THAT OF THE JURY PURSUANT TO THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION.

Since the question of Statute of Limitations is a

question of fact and not a question of law, and that the complaint alleges equitable relief, the traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury remained and led to some difficulty. Under the old equity rules it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. *Scott v. Neely*, 140 U.S. 106, 109 (1891); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669 (1850); *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466, 470 (1874); *Killian v. Ebbinghaus*, 110 U.S. 568, 573 (1884); *Buzard v. Houston*, 119 U.S. 347, 351 (1886). Where an action at law evoked an equitable counterclaim the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, res judicata and collateral estoppel could operate so as to curtail the litigant's right to a jury finding on factual issues common to both claims. But priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity where the remedy was complete at law served to guard the right of trial by jury and were liberally construed. *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932).

This difficulty has been resolved by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court

ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. Subsequent jury trial of these issues would probably be precluded by collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres v. Westover*, (1959) 359 U.S. 500 at 510-511. Then in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before a jury, because the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished. If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990).

Respondents' misapplication of the proper test only reinforces the need for this Court to adopt clear standards. It indicates Respondents' efforts to identify and apply a different standard by which to evaluate Petitioner's claims, despite the authority provided in *Cipollone*. This Court should clarify the confusion stated in *Cipollone* and provide such a standard.

CONCLUSION

The Court should grant this Petition and directly address the application of the Statute of Limitations to claims that were brought as a result to injuries caused by Defendants' conduct (duty not to deceive) and not their

product. Furthermore, the Court should clarify the distinction between the province of the Court and that of the jury pursuant to the Seventh Amendment of the United States Constitution.

Respectfully Submitted,

Maher W. Soliman, JD
Petitioner in Propria Persona
1112 Larkin Street, No. 405
San Francisco, California 94109
Telephone: (415) 776-3998
Facsimile: (415) 771-1350

NO. 02-1633

==========

IN THE

Supreme Court of the United States

MAHER W. SOLIMAN

Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.

Respondents.

PROOF OF SERVICE

I, MONICA VOGEL, do swear or declare that on this date, June 20th, 2003, as required by Supreme Court rules of Court, I have served three copies of the enclosed REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be

served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Michael R. Doyen, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
Los Angeles, California 90071-1560
Attorneys for Philip Morris U.S.A., Inc., Philip Morris Companies, Inc.

Patrick J. Gregory, Esq.
Shook, Hardy & Bacon LLP
333 Bush Street, Suite 600
San Francisco, California 94104-2828
Attorneys for Philip Morris Incorporated; Philip Morris Companies, Inc.; and Lorillard Tobacco Company

Thomas G. Scarvie, Esq.
Howard, Rice, Nemerovski, Canady, Falk & Rabkin LLP
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Attorneys for RJ Reynolds Tobacco Company

Susan E. Foe, Esq.
Dryden, Margoles, Schmaneck, Kelly & Wait
One California Street, Suite 2600
San Francisco, California 94105
Attorneys for Liggett Group, Inc.

Shelley L. Brittman, Esq.
Sedgwick, Detert, Moran & Arnold
One Embarcadero Center, 16th Floor
San Francisco, California 94111-3628
Attorneys for Brown & Williamson Tobacco Corporation individually and as successor by merger to The American Tobacco Company.

Steven H. Bergman, Esq.
Simpson, Thacher & Bartlett
10 Universal City Plaza, Suite 1850
Los Angeles, California 91608
Attorneys for B.A.T. Industries P.L.C.

Daniel J. Friedman, Esq.
Loeb & Loeb LLP
1000 Wilshire Boulevard, Suite 1800
Los Angeles, California 90017-2475
Attorneys for Council for Tobacco Research - U.S.A., Inc.

Mary C. Oppedahl, Esq.
Crosby, Heafey, Roach and May P.C.
1999 Harrison Street, 22nd Floor
Oakland, California 94612
Attorneys for Tobacco Institute, Inc

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 20th, 2003

_____

MONICA VOGEL